Exhibit 5

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
MDL DOCKET NO. 01CV12257-PBS
****
IN RE: PHARMACEUTICAL
INDUSTRY AVERAGE WHOLESALE
PRICE LITIGATION
****
THIS DOCUMENT RELATES TO:
ALL ACTIONS
****

C O N F I D E N T I A L

VOLUME: I

DEPOSITION of RAYMOND S. HARTMAN, Ph.D., a witness called on behalf of the Defendants pursuant to the Federal Rules of Civil Procedure, before Jessica Williamson, Certified Shorthand Reporter, Registered Merit Reporters, Certified Realtime Reporters, and Notary Public in and for the Commonwealth of Massachusetts, at the offices of Ropes & Gray, One International Place, Boston, Massachusetts 02110, on Thursday, October 7, 2004, commencing at 2:01 p.m.

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AFTERNOON SESSION

(RAYMOND S. HARTMAN, Resumed.)
DIRECT EXAMINATION, Continued

BY MR. EDWARDS:

Q. Before we left off we were talking about your methodology, and I believe in your declaration you state that you intend to calculate but-for spreads by using yardsticks based on market expectations?
A. Based on market results that prevailed and informed consumer expectations, third-party payer expectations absent the A to BP scheme during periods of time for drugs that were not subject to that.
Q. You have calculated yardsticks for market expectations? Better way of putting it.
A. Are you asking whether I have or whether I will?
Q. Well, I thought you had already done it.
A. Well, I've done some illustrative versions

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of the kinds of information that one would use, but I wouldn't say those are the final yardsticks. As I've said explicitly therein, that they would need to be refined through 30(b)(6) depositions and talking to the people, a variety of people to help clarify what those expectations were.
Q. Are you saying that it's doubtful that you'll use any of these yardsticks at trial?
A. It's there -- they appear in my declaration. They may be the final yardsticks that I do rely on, but I'm certainly going to refine them as best I can with whatever discovery materials become available.
Q. And your yardstick spreads reflect industry expectations regarding price ratios and relationships absent operation of the AWP scheme; is that correct?
A. They will.
(Discussion off the record.)
Q. Why don't you take a look at Paragraph 21 of your declaration.

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(Witness reviews document.)
MR. EDWARDS: Will the person who just got on the phone identify themselves, please?
MR. PALERMO: Yeah. It's Chris Palermo for Defendant Day.
MR. EDWARDS: Okay.
A. I've looked at that paragraph.
Q. As I understand it, you intend to develop these yardsticks by using survey information and by comparing AWPs and ASPs for drugs unaffected by the scheme; is that correct? Or the alleged scheme, I should say.
A. I'm going to be using that and other -- whatever other information helps me inform my yardsticks.
Q. Well, are there other devices that you're presently aware of that you intend to use for this purpose?
A. Other devices? I'm not quite sure I understand what you mean by that.
Q. Well, other methods. I mean, you've

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mentioned two things in your declaration, survey information --
A. Uh-huh.
Q. -- and comparisons, drugs affected by the scheme to drugs not affected by the scheme --
A. Right.
Q. -- correct?
A. Right.
Q. Is there anything else that you've thought of at this point?
A. I mention in Paragraph 29, in the bottom paragraph of Page 21, as I've introduced the notion of the yardsticks and discussed what I have put together to date for this illustration, I say, "Of course, finally yardstick spreads to be used to determine injury and damages during the damages phase would take these yardsticks as points of departure and refine them through 30(b)(6) depositions regarding the date provided by drug manufacturers and appropriate

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personnel, third-party payers."
So I plan to do my own survey work to the extent that I can and my own discovery work with people whose expectations we're talking about.
Q. Well, have you identified at this point any drugs that were not affected by the alleged scheme?
A. The alleged scheme and the class period begin in 1991, so any drugs prior to that period would be candidates for an examination. As to particular manufacturers that are not listed, I've yet to really look closely on who those manufacturers might be and what the drugs may be, but I plan to do that.
Q. So the answer to my question is no, you have not identified any drugs or manufacturers unaffected by the alleged scheme?
A. No. My answer is yes. I said all of the manufacturers here prior to the time of the alleged scheme, the class period beginning

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January '91 I will look at the defendants' data to the extent that it's available in the '80s.
Q. And so if that data shows that spreads prior to 1991, in fact, were larger than spreads after 1991, then there has been no impact?
A. I have -- I've got to look at all the information that is available to me and draw my conclusions of what the appropriate yardsticks will be.
Q. I take it what you're saying is that you don't think you'll be able to identify any comparables for the class period?
A. That's not true.
Q. Okay.
A. I haven't tried yet.
Q. Is it the case that the drugs you would use for that sort of a comparison, a comparison within the class period, would have to be drugs manufactured by companies other than the defendants in this case?
A. The selection of the manufacturers and the

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selections of the drugs will be based on evidence that I have -- I assume is forthcoming as to the scheme itself and how the scheme was implemented and which I've been asked to accept those allegations. And so that it is my understanding there's going to be evidence about which drugs and which manufacturers from whence I can make some judgment of whether there are some manufacturers or there are some drugs for the manufacturers that are listed here that may not have been subject to that -- to the scheme.

Q. Well, would the comparable drugs that we're talking about have to be drugs that are subject to patent protection and do not compete with drugs that are part of the alleged scheme?

A. You will notice that I've identified yardsticks for single-source branded drugs. I have identified yardsticks for multi-source branded drugs and for physician

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administered drugs and for generic drugs and so that whatever specific drugs I can find that will help inform the survey information that -- substantial survey information that's already done would be looking at drugs that would fit into those categories and face the kinds of competition that patented -- you're asking about patented drugs -- that patented therapeutic substitutes would face within a particular type of disease management regime.

Q. Yeah, but I'm talking about for the period of time, that is, the class period of this case --

A. Uh-huh.

Q. -- and I'm talking about drugs that you say would be unaffected by the alleged scheme --

A. That I would say --

Q. -- that you say you would use as a basis for developing yardsticks. Are you with me so far?

A. It's not that I would say, that it would be

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developed by evidence that I believe I will receive as to the sets of drugs, whether the scheme included all drugs of a manufacturer or a subset of drugs. That's evidence that I wait to receive.

Q. And is there a possibility that those drugs could be drugs that are competitive with drugs that are part of the alleged scheme?

A. You know, anything's -- I have to see what they are. I can't render something as impossible or possible without getting that evidence.

Q. Well, if you found a drug that was not part of the alleged scheme for purposes of comparison, do you think the fact that it was not part of the alleged scheme would have any impact on the ability of that drug to compete with drugs that are part of the alleged scheme?

A. Well, if you're asking me the hypothetical, are there two drugs whose clinical profiles are sufficiently close to be considered

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therapeutic substitutes on a formulary, and these are both branded drugs subject to patent protection, and one of them is subject to the scheme and one of them is not subject to the scheme, then the -- since the scheme is to make use of the spread to move market share, one would expect to find an impact of -- in terms of market penetration for those drugs, given the fact that the spreads were much larger on a drug that was a direct substitute that was comparable enough so that you have to deal -- at the therapeutic level you have to be thinking about both clinical profiles and you have to be thinking about price and spread.

And so that may be an issue, and it may be something that is a possibility, and I'll have to review that.

Q. Do you think an unaffected drug competes at all?

A. Sure.

Q. How?

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A. Clinical profiles. I mean, some drugs are just -- whatever their price is, they're going to be prescribed. Their clinical profile, their safety, their efficacy, their therapeutic effects dominate for certain kinds of uses.
Q. If the clinical profiles were the same, in other words, the two drugs in question were therapeutic equivalents, do you think the drug that was allegedly unaffected by the scheme could compete at all against a drug that was?
A. Are we talking now -- when you say their therapeutic equivalents, are you talking about generics, I mean, bioequivalent? What do you mean by "therapeutic equivalent"?
Q. They're within the same therapeutic category, but they're not generic equivalents, like a multi-source.
A. Well, but you're saying -- an example in your case would be anti-infectives where you have penicillins, you have cephalus

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sporings. You have a variety of anti-infectives.
Q. Sure.
A. Broad spectrum, narrow spectrum?
Q. Statins?
A. Yeah, statins I don't know that much about. The competition -- the therapeutic -- the competition among patent innovator drugs -- patent and innovator drugs, therapeutic substitutes, is going to depend on the full extent to which they are similar or they differ, the full range of the clinical profiles, and so that's more than just, you know, are they effective for this particular staph infection? Or I mean do they interact with other drugs? What are some of the side effects for certain people with certain other conditions? So that those things enter in, along with the financial considerations that are offered to the PBMs that are putting drugs on their formulary.
Now, if everything else is equal, if

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they're somehow exactly the same but one is offering greater financial consideration, that one will move more market share relative to the other one.
Q. Don't you think it's unlikely that you're going to be able to find any unaffected drugs in the generic arena?
MR. SOBOL: Objection to the form.
A. There are already surveys that have conducted studies on generic pricing through -- in the '80s and the '90s, part of it through the -- the early part of the conspiracy and certainly part of it before that already provide some yardsticks, and I have yet to see. I mean, I'm going to look at generic drugs earlier in the '90s, and I'm going to look at generic drugs in the '80s.
Q. And just so we're clear here, what criteria would you use to determine whether a drug is unaffected by the alleged scheme?
A. It's not going to be a criteria --

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(Discussion off the record.)
MR. MORGENSTERN: Okay. We'll just fix it at a break. I haven't gotten anything since lunch.
Q. Do you need --
A. No, no. At this station of my retention I've been not -- I've not been asked to put forward any criteria. I've been informed that there is evidence indicating which drugs and which manufacturers, which manufacturers participated in this type of scheme and which drugs were affected, and I'm looking at those. So I don't -- there's not some threshold use to include them. I'm being given a list and asked to look at them.
Q. Let me ask it a different way. What would a manufacturer have to do to get out of the alleged scheme, as you define it?
A. Well, what -- to get out of or to not --
Q. Let's say my client came to me and said, "You know, Steve, I'm tired of this case.

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They say we're doing something wrong. What should I do? What should my client do, in your view?"
A. In the legal remedies for that, I have not been asked to render any opinion about that. I've been asked to render an opinion about causation, impact, injury and damages. There is -- that's a prospective -- you're asking me a prospective question that might be part of injunctive relief that maybe Dr. Schondelmeyer may have some opinions about, but I haven't been asked to think about that.
Q. In terms --
MR. SOBOL: I have some ideas.
Q. In terms of determining market expectations -- which is what you're trying to do through these yardsticks, right?
A. That's correct.
Q. -- isn't it better to determine market expectations simply by talking to people?
A. Well, I think you want to talk to people,

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and you want to go do survey research, and we've been through a section where I indicate that I do plan to talk to people.
Q. Okay. And who do you intend to talk to?
A. Let me refer you again back to Paragraph 29, Page 21, and "Final yardstick spreads to determine injury and damages during the damages phase," et cetera, et cetera, "refine them through further 30(b)(6) depositions regarding the data provided by defendant drug manufacturers and depositions of appropriate personnel and third-party payers and managed care organizations."
Q. So you do plan to talk to class members to determine their expectations?
A. I plan to talk to class members. I plan to talk to PBMs, a sample of PBMs, a sample of retailers.
Q. So you would agree that the actual expectations of class members are relevant to your analysis?
MR. SOBOL: Objection to the form.

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A. I would agree that the summary of -- that whatever is used as a yardstick to define the expectations in the market should take advantage of as much information that's available about what was forming those expectations and what they were.
Q. Including information directly from the horse's mouth, the class members themselves whose expectations we're talking about here, right?
A. That's correct.
Q. Now, the surveys you rely on in your report don't deal with the expectations of class members at all; isn't that correct?
A. Well, what they deal with is they deal with -- it's not unlike the analogy that we were talking about in the automotive case -- the automobile case. These surveys essentially were conducted by the OIG of DHHS in order to provide the kinds of information about acquisition costs, average acquisition costs versus AWP.

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So this is the kind of information not to just talk about expectations, but it's what informs expectations. Many people don't have a clue what that relationship is, and some people think that AWP is, you know, is the acquisition cost. Others don't. These are the kinds of surveys that give information to and help inform consumers, the consumers being the class members.
Q. These are not surveys of class members, correct?
A. That's correct.
Q. And when you say that the findings of these reports form some part of the basis for the beliefs of class members about the typical spread, you're making an assumption, correct?
MR. SOBOL: Objection to the form.
A. Do you have the paragraph in which -- are you quoting me, or are you just -- are you paraphrasing me?
Q. Well, actually, I was quoting you.

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A. Good. Why don't you point me to that.
Q. You can look at Paragraph 24. Ah, sorry. Paragraph 24 of Attachment D. These attachments get me confused.
A. You're just trying to mess with my mind. I know you lawyers.
Q. You say in Paragraph 24, "It is reasonable to expect that the findings of these reports form some part of the basis for beliefs about the typical spread between AWP and actual acquisition costs of providers, physicians and retail drugstores," correct?
A. I do say so.
Q. Okay. And your statement that they form some part of the basis for the beliefs of the class is an assumption, correct?
MR. SOBOL: Objection to the form.
A. It is an informed assumption.
Q. What is the assumption based on?
MR. SOBOL: Objection as to form.
A. Conversations with colleagues at the Harvard School of Public Health.

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Q. Well, they're not class members, either, are they?
A. They are not class members --
MR. SOBOL: Objection to the form. I don't even know what "either" means there.
THE WITNESS: Yeah, it is a little confusing. I was going to straighten it out for you, but I'll let him straighten it out.
Q. You have not talked to any class members to determine whether these surveys have any impact on their belief as to the typical spread; isn't that true?
A. I have requested that such talks be noticed by counsel. I have not done it yet.
Q. So this particular part of your opinion is just speculation on your part, correct?
A. It is an informed assumption, as I said.
Q. Informed by conversations with non-class members?
A. Informed by conversations with chaired professors whose research focus is on expectations, how they're formed and pricing

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in this market.
Q. Okay. Who were those conversations with?
A. I've given you the names.
Q. Which ones? You've given me a lot of names.
A. I've given you Richard -- the chaired professors are Richard Frank, Joseph Newhouse and Meredith Rosenthal.
Q. Okay. And when did you have discussions with them about the extent to which government surveys had an impact on the beliefs of class members with respect to typical spreads?
A. As I was developing and outlining this section and the industry's reliance on AWP as a benchmark.
Q. So it would have been this summer?
MR. SOBOL: He's in the middle of answering the question, I think.
THE WITNESS: Yes.
MR. SOBOL: Have you finished answering or no?
THE WITNESS: I had finished

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answering.
A. And, yes, it would be this summer.
Q. Okay. And you talked to all three of them about that?
A. I don't recall.
Q. How many times did you talk to them?
A. I probably had conversation -- Meredith and Richard -- well, Richard and I collaborate on some research so we have conversations every other day or so. Meredith and I talk about a variety of consulting assignments and so we have conversations four or five times a week, almost daily.
Q. And you didn't take any notes on these conversations?
A. No.
Q. Do you know whether Richard Frank talked to any class members about what their beliefs were or whether they had any beliefs based on these government surveys?
A. I know Richard Frank does research and a variety of research is funded at Harvard by

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third-party payers, and so I -- but to the extent -- as we talked about this, I didn't ask him, "Who did you talk to to base that on?"

Q. That's just another assumption you're making?

MR. SOBOL: Objection to the form.

A. An assumption that Richard Frank is on the faculty at Harvard and that he speaks with these --

Q. An assumption that Richard Frank had talked to class members about whether they had any expectations based on government surveys.

A. I have consulted with a variety of experts who know this industry, and based upon that consultation, I have come to put forward informed assumptions about how -- about how expectations are formed, and I'm going to confirm that during the damages phase of this litigation.

MR. EDWARDS: I'm goes to mark as Exhibit 7 a copy of an article from Barron's

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dated June 10, 1996.

(Document marked as Exhibit Hartman 007 for identification.)

Q. The reporter has handed you Exhibit 7. Have you ever seen this document before?

A. I can barely see it now. God, they should have done a little better job of Xeroxing this. I have not seen this article, as far as I know.

Q. If you look at the first full paragraph, there's a sentence that says, "For many drugs, especially the growing number coming off patent and going generic, the drug providers actually pay wholesale prices that are 60 to 90 percent below so-called average wholesale price or AWP used in reimbursement claims."

Do you know whether any class members were aware of this article?

A. From what I have seen in the litigation that's occurred in this industry and the history over the past five years, that this

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kind of information started to be perceived by third-party payers and by self-insured groups. There are articles that I quote in my -- and that we can turn to here where they're finally saying, "Look, we know this is going on. We didn't -- we've just become aware of it. Where's our money?" And they're either forming their own PBMs or doing something else.

So that this certainly -- the numbers that you're putting forward here correspond in some way -- correspond partially to what the OIG finds in their surveys past '97, and they started to be reflected in the consciousness of entities becoming aware of the extent of an AWP scheme where the ASPs do fall 60 to 90 percent. That's certainly -- there's really no need to go to this. I cited in my own document -- in my own declaration reimbursement rates as I have seen for generic drugs essentially fall at -- to third-party payers 20 to 30 percent

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with a generic launch while the actual prices dropped this much. And the entities have become aware of that over the last several years, and it's been reflected in the litigation.

Q. So you think that class members could have seen this article, and it could have had an impact on their expectations with respect to the spread?

MR. SOBOL: Objection to the form.

A. I'm saying that it is information like this, combined with an accumulation of practices and procedures that have evolved over 30 years, that began to change expectations in the -- at the turn of the century, that this stuff started to become -- this started hitting the radar screen in the late '90s in the OIG reports and in reports of this sort; however, it did not yet get reflected in the ability of the third-party payers to get an AWP that was representative of these discounts. And that's the whole effect of

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the AWP scheme.
Q. What is your basis for that statement?
A. My basis for that statement is looking at contracts with PBMs and with third-party payers and with Medicaid that are talking about generic pricing reimbursed at AWP less 15 or 20 percent, which is -- these should be -- to the extent that they acted on this, it should have been that AWP less 60, 80 percent.
Q. How do you know that these third-party payers were not aware of the Barron's article, and the deal they got was simply the best deal they could negotiate?
MR. SOBOL: Objection to the form.
A. I take as a measure of their revealed bargaining power and their revealed understanding of the full landscape of all these prices to be reflected in the rates that they're able to negotiate, and if they had known about it, they would have negotiated more aggressively.

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Q. And if it turns out that class members in this case testify that they did know about the Barron's article, how does that affect your opinion?
MR. SOBOL: I'm sorry, objection. What opinion?
Q. Well, you just opined that they couldn't have known about it; otherwise, they wouldn't have negotiated the contracts they did, correct?
A. What I said was the contracts they negotiated reflected the -- an accumulation of an understanding of price relationships based off of AWP, sporadic articles that began to bubble to the surface about the implications of the AWP scheme that showed themselves in articles like this that were still not pervasive enough or diffused enough to affect their ability to avoid the injury from the AWP scheme.
Q. How do you know they were not pervasive enough or diffused enough? What have you

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done to determine that?
A. I've looked at the contracts in which the -- that they've entered into in 2001, 2002, and they're not AW -- if they knew about this and they felt that they could -- this was a useful competitive fact, they would have submitted -- they would have said to their PBMs or to whoever was managing their pharmacy benefits, they would say AWP is inflated. I'm not -- I don't want AWP minus 15 percent, I want AWP minus 90 percent, and that's a revealed statement of the fact that they knew what was going on and they could defeat that scheme. They didn't do that. I see the contracts.
Q. Just so we're clear on this, is it correct that you don't know one way or another whether members of the class saw this Barron's article that we've marked as Exhibit 7, correct?
MR. SOBOL: Objection to the form.
A. Have I asked for all the members of the

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class or a substantial subset of the members of the class whether they've seen this article? No.
Q. And you would agree with me that if they did see the article, it would have an impact on their expectations with respect to the spread, correct?
MR. SOBOL: Objection to the form.
A. Any piece of information of this sort the OIG came out with information around this time, 1997, '98 reports showing these kinds of results, not quite to this extent. So this information diffuses slowly through market, and from what I see in the negotiating tactics of the third-party payers, it is not reflected quickly in what they -- in what they do.
So even if they saw this, whether they thought, well, this is so minor this might have been a couple of drugs or how far they pursued it, that's -- it is clear from what they negotiated that they didn't -- that

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this didn't reflect enough of their changes and the expectation for them to demand a competitive response to reduce their reimbursement rates off of an AWP that was inflated.
Q. Well, don't you think it's important to talk to them about whether they saw this article, and if so, what impact it had on them, and if it didn't have an impact on them, why it didn't have an impact?
MR. SOBOL: Objection to the form.
A. See, you ask the questions, but you don't listen to my answers, do you? I've -- can we go back to Paragraph 29, Page 21? I'm going to talk to these people through 3(b)(6) depositions, and I'm going to -- I see these articles, academics see these articles. The extent to which there was the entire group of third-party payers is reflected by their revealed behavior, which I don't see. I've got to find out more about that through the 30(b)(6) depositions

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that I've asked to have noticed.
Q. Yeah, and you can't determine the impact on your opinion until you make those inquiries, right?
A. No. My opinion is as to causation, it's to impact, it's to existence of injury, and it's to the existence -- it's the existence of damages and the ability to calculate it. All of those things can be done on a class-wide basis without going to each and every third-party payer and asking whether they know about this. I can -- there will be enough information available in what they paid in reimbursement rates to show how close they were to measures of ASP. There will be data that is easily and readily available to show what their behavior indicates they knew and how they behaved as a result of that.
Q. If the information with respect to actual expectations that you obtain during the course of discovery is inconsistent with the

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assumptions you've made by looking at contracts, which wins out at the end of the day, actual information as to actual expectations or the assumptions you've made by reading contracts?
MR. SOBOL: Objection.
A. What do you think would be my answer to that? The --
Q. Actual information always trumps --
A. Yes.
Q. -- assumptions, correct?
A. The realty of what's going on in the market is going to be -- I'm crying (sic) to get my handing on that information. There is real information already that corresponds to this Barron's article and the OIG reports. I've already cited it. I want more. The more, the better. And if it contradicts it, then it's going to change. The results will be refined as the information indicates.
Q. Now, the OIG reports that you cite in your declaration, you didn't actually read those

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reports, did you?
A. I did read some of them.
Q. Well, in Footnotes 31 and 32 what you cite are later reports --
A. Yeah. The --
Q. -- that purport to summarize the earlier reports; is that correct?
A. I'm sorry, could you point me to the footnote that --
Q. 31 and 32.
A. And are we in the main body or in the --
Q. No. We're in Attachment D.
A. And I'm sorry, footnote what again?
Q. Footnotes 31 and 32.
A. 31 in attachment -- oh, I'm sorry, I see it. Even I'm confused.
Q. It's Page 8 of Attachment D.
A. I was just looking at the wrong attachment. What I did when I learned of these OIG reports is I asked to see every one we can get our hands on, and some of the earlier ones were just not easily accessible, is my

12 (Pages 207 to 210)

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recollection, and so there were summaries in the later ones of some of the earlier results, and I relied on those summaries given the fact that I took this effort to be an illustrative presentation rather than the final calculations for purposes of damages.

Q. So Paragraph 21 of Attachment D of your report refers to a 1984 OIG report and a 1989 OIG report, and you did not read those actual reports, you read summaries of those actual reports that appear in reports that were issued in March of 2002 and August of 2001; is that correct?

A. I'm not sure it's correct. As I say, I had asked for all of them, and as I initially wrote this, I had the later ones. I think we got some of the earlier ones later, and I just didn't say that I -- I didn't mention that here, but I would have to...

Q. Well, are you aware that those early reports actually report a range of discounts --

A. I do.

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Q. -- below AWP?

A. I'm aware of that.

Q. You purport in your declaration to come up with an average discount; is that correct?

A. Well, the discount -- I know that these -- I mean, the rank as they were reported later were for different groups of pharmacies where the ranges occurred, and then there was an average overall, and I reported the average overall. And that's true for the 2000 -- the '97 and the 2001, 2002. I don't know if that's the range you're talking about.

Q. And is it the case that the 1984, 1989 reports also combined brands and generics, that didn't separate them out?

A. That is correct.

MR. EDWARDS: What I want to do is mark as Exhibit 8 a copy of a OIG report dated August 10th, 2001, and as Exhibit 9 we'll mark the OIG report dated March 14, 2002.

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(Documents marked as Exhibit Hartman 008 and Exhibit Hartman 009 for identification.)

MR. EDWARDS: And why don't we, since we're marking that -- Saul, are you up yet?

MR. MORGENSTERN: No.

MR. EDWARDS: Why don't we take a break while one of our colleagues here gets back on-line.

(Recess taken.)

Q. Do you recognize Exhibits 8 and 9 to your deposition?

A. I do.

Q. What are they?

A. They are two of the OIG reports that I have cited in my declaration.

Q. Now, if you look at the 2001 report, Exhibit 8 --

A. Right.

Q. -- and turn to the executive summary, you'll see that there are estimates of the discounts below AWP for brand-name drugs in

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1994 and 2001; is that correct?

A. That is my understanding.

Q. And what are those discounts?

A. What I see for this report -- let me just confirm --

MR. SOBOL: Objection to the form, but you may answer.

A. -- that the -- well, let me just read it. "We estimated that the actual acquisition cost for brand-name drugs was a national average of 21.84 percent below AWP. Our previous estimate for calendar year '94 showed a discount estimate of 18.3 percent."

Q. And then if you look at Exhibit 9, there are similar estimates for generics, correct?

A. Correct.

Q. What are those figures?

A. In the particular analogous paragraph we estimated that the actual generic drug acquisition cost was a national average of 65.93 percent below AWP. That is for the 2001/2002 survey. Our previous estimate for

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calendar year 1994 showed a discount of 42.45 percent below AWP for generic drugs.
Q. And you decided not to use those estimates in developing your yardsticks; is that correct?
A. No. Those estimates you'll see in my paragraph -- well, I used them, but in the fashion that I describe in Paragraph 21, and that is that essentially these estimates, which are discounts off of AWP, translate into a formulaic relationship to the actual acquisition cost, and I summarized those results in Section -- in Attachment D, Page 8, summarizing for the -- I summarized the OIG reports prior -- in the early part of the period.

I talk about the -- finally in 2001 and 2002 the OIG issued their most recent reports finding that the AWP was equal to 2.94 times the AAC for generic drugs which I think will correspond to the number here for generic drugs, and for AWP is the 1.28 times

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the actual acquisition cost for branded drugs.

And so in Paragraph B below I talk about the range of the most recent reports, and I talk about the range going back to the '84 reports. And I say, "And it is my belief, based on the evidence that I've seen to date, that the expectations as revealed in negotiated contracts were set by those earlier relationships that we find in the '84, the '87 and the '94 reports." The '97 -- this report here for 2001/2002 is reflecting information similar to what we're finding here on your Barron -- in your Barron's article, and this, again, based on my observed behavior of negotiations revealed in contracts, suggest that while this was beginning to percolate into the expectations and alter expectations, it by no means set the basis for expectations for the market.
Q. Well, let me see if I understand what you're

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saying. You're saying that you rejected the numbers that appear for '94 and 2001 in Exhibits 8 and 9 because, as you state on Page 8 of Attachment D in Subparagraph D of Paragraph 21, quote, "Given the allegations in this matter, the more recent and larger spreads reflect the AWP scheme to an unknown extent and are contaminated to an unknown degree for use as yardsticks for non-fraudulent pricing behavior," correct?
A. That's correct.
Q. And what do you mean by reflecting the AWP scheme to an unknown extent and contaminated to an unknown degree?
A. Well, we're looking at the notion and the set of allegations that I've been asked to assume are that a scheme was initiated, the AWP scheme was initiated by the drug manufacturers so named and the period of time over which it was implemented and effectuated started in January 1991. So the damage period, the period of violation is

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from 1991 on.

So if I'm observing measures of what it is that I'm looking for in terms of spread in a period but for the allegations, I've got to be looking for a period prior to '91. These numbers from '91 on are reflecting exactly the -- they're corroborating the allegations put forward by the class and by plaintiffs, that indeed the pricing did deviate in a way as people were beginning to see this revealed information from what the expectations were prior to the period of the alleged violations.

When you're looking for a but-for period, you want to look for expectations and relationships in a period not subject to the violations. The violations occurred in at the '90s, so I would expect these spreads to be increasing over time. This is a measure of the fact that the allegations are corroborated in the evidence.
Q. So are you saying that people in the class

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could not have had expectations consistent with the discounts off of AWP that were reported at the time they would have had those expectations, because their expectations can only be based on information that was reported prior to the alleged scheme?

MR. SOBOL: Objection.

A. I am saying that I am looking for information that tells me about the relationship between the benchmark price in this market and the underlying transaction values, prices in this market, average sale price.

Q. Okay.

A. And I'm saying I'm looking for relationships that are unaffected by the alleged scheme. And there are -- there was a period of time when those expectations were formed when it is my understanding that there is no scheme alleged for that period of time. Now, that would inform people's expectations about the

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relationship of a benchmark price to all other economic measures of value related to that benchmark price.

Over the '90s there is an allegation of this scheme that was -- would begin to have effects as indicated in the Barron's article and as indicated in the OIG reports, but the extent to which people -- third-party payers and entities and individuals generally become aware of this type of information, with some lag, and what -- the work that I've been able to do in examining the revealed behavior of people of institutions and entities in the class demonstrates to me that while they were available -- that this information was beginning to become available, there wasn't sufficient enough basis to begin to negotiate in ways or to undertake the types of behavior that we see occurring over the last two or three years in response to a final understanding of these kinds of --

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these alleged violations.

Q. Are you saying that you're using expectations from a time period prior to the alleged scheme in order to determine expectations during the alleged scheme?

A. I am saying that as any model in any trust damages or any model in economic damages, one is -- one performs a before and after type of analysis where there is some allegation of illegal behavior, and then you look for what the behavior was in a period when it wasn't occurring. And there is a period of alleged violation here that's '91 forward, and there is impact on prices that occurred at that point.

Q. Well --

A. And in order to measure -- what's formulating and forming the class's response to that behavior are expectations that were set when this scheme wasn't in operation, which was the period beforehand.

Q. Well, let me make sure I understand what

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you're saying. In determining or developing your yardsticks for the class period, are you looking at expectations during the alleged scheme or during some other period?

A. I am looking for I relationship -- I am looking for what the perceptions and the reasonable expectations of the class members were regarding AWP as a signal for drug prices and values, a variety of other prices that was untainted by and uncontaminated by the scheme -- by the alleged AWP people, and hence those yardsticks would come from a period when the scheme wasn't going on, and that would have been the '80s for one thing, or it could have been drugs for which the scheme was not going on or manufacturers during the '90s.

The point that these spreads are changing and increasing is exactly the revelation -- and that are not reflected in the third-party payers responding aggressively and saying, "Wait a minute. I

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want discounts reflecting this," is an indication that their expectations were adapting, with the lag. They were -- their reasonable expectations were based on a set of pricing that existed prior to it. Information was becoming available slowly. And the competitive landscape was complex enough and the pricing was non-transparent enough that it wasn't clear how to respond to this type of information, and I assume that we're seeing an ultimate response to this information in the fact that we're having this conversation.

Q. In other words, what you're saying is if people in the class had expectations that were consistent with the public reports during that time period, they would have been able to negotiate better deals?

A. I am saying that if third-party payers were able to break through the veil of -- the non-transparent veil between what AWP was and what it -- what the true transaction

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prices turned out to be over this period of time, their negotiating stances and the contracts that had been put in place over years would have been -- they would have respond -- there would not have been the misrepresentation or the fraudulent concealment that I understand is the basis for the legal allegations.

Q. So you're basing your opinion with respect to expectations on the terms of the contracts as opposed to evidence of what the actual expectations were at the time, correct?

A. Can we go back to Page 21, Paragraph 29 of my report? And I plan to examine more completely through those depositions how -- I want to know more about that, but the revealed evidence that I find suggests that those expectations were conditioned on earlier relationships and the types of information that fully understand the extent of the scheme and to avoid the

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misrepresentation was unavailable to the class.

Q. So you're making an assumption as an economist that the terms that people are able to negotiate are going to be consistent with their expectations?

A. I'm making an assumption that as -- an economist that as parties enter into negotiations, the result of those negotiations are going to depend crucially on the extent to which they have information and what they're negotiating about.

Q. Well, did it ever occur to you that sometimes people don't achieve their expectations?

A. Yeah.

Q. That happens in the real world, right?

A. It does.

Q. And that's something you would have to take into account in doing a proper analysis of impact here, correct?

A. It may be one of a variety of additional

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things that need to be addressed. And just in closing along this line, both expectations and data that reveals those expectations and the contracts, what I do make clear or hope to make clear in the concluding paragraph of my declaration is that an appropriately stratified sample of information from a set of class members, so a sampling of some large TPPs, some middle-sized, some small ones, some retailers and PBMs will provide all of the claims data that one can differentiate these issues across the class.

Q. Okay. You say sampling from class members. How do you propose to gather those samples?

A. I propose to ask for claims data for all drugs subject to the complaint from your clients.

Q. Well, I believe you also testified that you plan to --

A. I'm sorry, not from your clients, from our clients and also from your clients.

16 (Pages 223 to 226)

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Q. So you need claims data from class members, correct?
A. We need claims data from class members, that's correct.
Q. And you need to get information from class members on what their expectations actually were, correct?
A. There will -- the -- let's be very clear about class members. What we're going to need is a -- to identify using standard statistical methods a number of selected types of third-party payers and also PBMs and also retailers differentiated in various ways. And we're going to get claims data and data as to expectation and knowledge for those representative entities to characterize the class as a whole and the transactions as a whole.
Q. Do you intend to gather data or information with respect to actual expectations from surveys, or are you going to limit your efforts to what is uncovered in the

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discovery process?
MR. SOBOL: Objection.
A. I am going to push the discovery process as aggressively as necessary to do it correctly.
Q. But it's conceivable that you might also do some surveys?
A. It's conceivable.
Q. Okay. And I take it that what you plan to do is gather all of this information from third-party payers, from PBMs, from retailers, from others and then express some opinions based on this information, correct?
A. The claims data that, say, the third-party payers tabulate and keep track of frequently turns out to be similar claims data that is exchanged with the retailers and the PBMs and even your clients in their drug utilization reviews for the payment of rebates, so that we're going to have the same data and corroborate this data from a variety of sources. And so we're going to

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have that data, and we're going to observe what was actually reimbursed by different groups of class members.
Q. And just to make sure we're clear here, you're going to look at more than claims data, right? You're going to look at actual evidence, testimony from people as to what their expectations were, correct?
A. I'm --
MR. SOBOL: Objection to the form. You've been using this expression of "actual," and I think this has been like two ships passing at night for a lot of the questions. I'll let you continue, but that's why I keep on using the word "objection." I'm not sure if there's been a meeting of the minds as what the colloquy has been on a lot of those questions.
You can go ahead and answer.
MR. EDWARDS: Not a proper objection, Tom.
Q. Go ahead.

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MR. SOBOL: I was trying to be helpful, but I'll shut up.
THE WITNESS: Are we done?
MR. SOBOL: Yes, we're done, for now.
A. The actual reimbursements paid is something that will be readily accessible from these claim data from these various sources which will reveal the result of -- the negotiated result of the expectations of the class members and the entities with whom they were negotiating the contracts or paying -- to whom the claim -- the reimbursement rates were being paid.
To the extent that I am -- and that's talking about -- when we're talking about actual data, that's talking about actual results. We're talking about the actual endpoint of negotiations toward whatever discounts, et cetera, et cetera, or rebates -- percentage discounts off of AWP we find in the data, and to the extent that

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it is possible to ascertain the interpretation of the third-party payers to the types of information we're referring to here, that will be done.
Q. And if there are disputes as to what the proper interpretation is, I gather what we'll do is we'll put those third-party payers on the witness stand and have at it, right, direct examination, cross-examination, and we can explore the area of dispute, correct?
MR. SOBOL: Objection to the form.
A. I don't know what your legal strategy will be or who you're going to want to depose, and I assume you're going to depose whomever you want to depose. I'm going to gather this information, this claims information, and a select -- and a sample from a sample of third-party payers and others whatever information is provided that will allow me to refine my yardsticks. These yardsticks themselves have ranges, too. So I'm not

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coming up with something where I'm saying it's 10 percent or 12 percent. We're coming up with ranges.
And that's going to be the type of evidence I'm going to look at, and then you can do whatever you want to. You know, I will present what evidence I have found that tells me what people have done, what they've negotiated, and the degree to which their expectations were informed as they have been -- as I've stated that they've been informed.
Q. Well, would you agree that a fair way to do it would be to put a number of these class members on the witness stand, let the lawyers examine them, and then you can develop your yardsticks and your other opinions with respect to expectations from that testimony, and the defendants' experts can do the same thing?
MR. SOBOL: Objection to the form.
Can you repeat that -- read back the

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question? You're being asked what's fair.
THE WITNESS: No, no. I'm just -- I heard that. You don't have to object to tell me...
A. Yeah, fair is -- I'm not being asked to be fair here, I'm asked to be -- to do science. And what I'm saying is I'm going to design representative surveys or samples of entities that represent certain parts of the spectrum within the class, within PBMs, within retailers, within mass merchandisers, and perhaps for the manufacturers. I'm going to get claims data that reveals what actually happened, and I'm going to ask that to the extent that it's scientifically sensible and can be ascertained via a survey about how their expectations were informed relative to the data that I see in the industry. And I assume your expert will do a similarly scientifically based analysis, and then we'll wrestle.
Q. Okay. But I take it there's no way of

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getting around actually hearing from these people directly; isn't that true?
A. No, I haven't --
MR. SOBOL: Objection to the form.
A. I haven't come to that conclusion. I'm going to look -- any economist is going to get as much information as they can, and there are times when one can do surveys where the surveys -- there are certain biases or recollection biases or certain kinds of hypothetical biases. One has to decide to the extent that surveys are reliable, and if surveys are reliable, then it'll be something that I'll investigate.
MR. EDWARDS: What I want to do is mark as Exhibit 10 a copy of the deposition of Mike Beaderstadt of -- I think he's with John Deere that was taken in this case on September 17th.
(Document marked as Exhibit Hartman 010 for identification.)
(Discussion off the record.)

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Q. Have you read this deposition?
A. Not to my recollection.
Q. Have you read any depositions in this case other than the one you referred to earlier today?
A. I have seen transcripts, but I can't recall whose they were, and there were none that were sufficiently compelling that I felt it was useful to cite them, to rely on them in my report.
Q. Okay. I want you to turn to Page 44 of this deposition. Line 8, the question is:
"Is this the position of John Deere that it has been misled by drug manufacturers since 1991 as to the meaning of AWP?
"ANSWER: No, I don't think so. It wouldn't be my position, I guess. I don't know that I can speak -- that John Deere has a position on that."
Now, would you want to explore further with Mr. Beaderstadt why he thinks he was

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not misled as to the meaning of AWP?
MR. SOBOL: Objection to the form. You may answer.
A. I'm not sure.
Q. Well, if Mr. Beaderstadt was not misled as to the meaning of AWP, then he wouldn't have been defrauded, correct?
MR. SOBOL: Objection.
A. This is such an open-ended question. In order to understand the notion of information being concealed and there being misrepresentation or someone being misled, you know, I would have to look at the rest of this deposition to see whether the terms have been fully defined, what he really knows, whether he's in a position to know anything. You know, I don't know who this guy is. It's clear if someone says they've either been misled or they haven't been misled you want to say, "Well, in what way?"
So you've given me one, two -- eight sentences out of context. This may be

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somebody -- if this is a small self-insured group, there may be one of a sample of self-insured third-party payers that we will want to get data from and I will want to talk to more, but I can't -- from this I can judge nothing.
Q. Right. You would want to talk to him to find out more about exactly what he means, correct?
A. I would want to talk -- if for the sample that I've talked about that represents groups of self-insured entities, there are some selected groups and entities therein that I will identify, that I'm going to want data from, and I'll also want to 30(b)(6) them both as to the data and more about what they knew. Whether it's Mr. Beaderstadt I don't know.
Q. And if there is a dispute as to what they knew, then that's something that the jury has to resolve in the case, correct?
MR. SOBOL: Objection.

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Q. Is that your understanding of how it takes place --
MR. SOBOL: Objection.
Q. -- in America?
A. Oh, please. What I understand is the following: I'm going to do some modeling. I'm going to take standard economic practices, principles and econometric and statistical methods, should they be needed and necessary, and I'm going to develop the model that I've outlined in this text, relying on this declaration, relying on a sample of the data that I've discussed. And that's what needs to be done for me as an expert.
Q. Well, let's talk about data for a moment here. As I understand it, the class is defined in terms of people who purchased drugs or entities that purchased drugs pursuant to contracts that explicitly referenced AWP; is that correct?
A. That's correct.

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Q. And what are you going to do if the data, the claims data that you're looking at is inconsistent with AWP or inconsistent with a hypothesis that the pricing was based on AWP?
MR. SOBOL: Objection.
A. I'm not quite sure I understand -- I mean, how could a claim -- some claims data be inconsistent with -- I don't understand what you mean by "inconsistency."
Q. Well, I mean, for example, what are you going to do if the claims data suggests that the prices varied all over the lot?
A. The --
MR. SOBOL: Objection.
A. You mean the reimbursement rates?
MR. SOBOL: Well, he didn't make that clear. He says, is this the price? It's not reimbursements or prices to anybody in the chain or anything else.
Q. Yes, reimbursements.
A. So what you're asking me now is, I go to a

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group of third-party payers and suppose I stratify a sample of two of the largest, four of the mid-sized and 10 small ones or whatever I ask it to be, and I ask for all their claims data under their various drug benefit plans, and I look at what those reimbursement rates are relative to AWP? Is that -- that's your question?
Q. Yes.
A. Okay. What I expect to find is reimbursement rates will be related to AWP based on analyses I've done in a variety of other cases and this type of data that I've reviewed in other cases. And I expect to find some differences in the relation -- the relative discount off of AWP, 15 percent, 5 percent, that will usually be related to the attributes of the drug benefit plan, the closeness of the formularies, the aspects of the formularies. And I will be able to explain that using statistical models that will show me a relationship of reimbursement

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rates to AWP that -- period.
Q. What are you going to do if the claims data is inconsistent with your hypothesis?
MR. SOBOL: Objection.
A. That the only way that -- so the way that it would be inconsistent is that AWP is not a -- is in no way a determinant of the reimbursement rate. Is that what you're saying?
Q. I mean, what -- let me give you an example.
A. That's the only way it could be inconsistent.
Q. Let's say you're looking at a particular drug and the AWP is a dollar?
A. Uh-huh.
Q. And let's say the contract calls for a discount of 15 percent?
A. Off of AWP?
Q. Off of AWP.
So you would expect to see reimbursements at 85 cents, right?
A. Perhaps. There may be more to the contract.

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There may be something that kicks in with usual and customary that is still -- that's driven by AWP, and then there are changes that are introduced, but it's still related to AWP.
Q. What are you going to do, for example, if the actual reimbursement rates that you see in the claims data ranges from 60 cents to 90 cents?
A. I would expect in the analysis of claims data I've done before that I will find that, and I will find that that's -- that can be explained by the type of plan. And when I get the data from retailers where I'm able to look at claims data over 300 or 400 third-party payers, I've been able to do statistical work that demonstrates pricing varies by particular groups, four or five groups, that is very -- these contracts and the various types of negotiations are not customer-specific. They vary by type of third-party payer, and they're easily

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groupable into a subset.
Q. Well, one of the things that you could do is talk to the payer to try to get a better understanding of the data and how you can reconcile it, correct?
A. Well, certainly if I'm looking at reimbursement and how it relates to AWP, I don't need to talk to the payer. I just need to look -- the data -- he might not even know what the data is. I might want to talk to the payer about other things, but the data is going to tell me how his reimbursement rates are related to AWP.
Q. Okay. But my hypothetical, if you'll stay with me for a moment, is that you're looking at reimbursement data, and even though the contract data says AWP minus 15 percent and you're looking at a drug for which the AWP is a dollar, you see reimbursement rates varying from 60 cents to 90 cents, don't you think it would be useful to talk to the payer to try to figure out how that could

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have happened?
A. Well, if I go to the payer, he's going to put in front of me the pro forma contract, and he's going to put in front of me the kinds of levels of discounts that he has paid or rebates that he has paid, and what the percentages off AWP that's related to characteristics of that third-party payer. And I'll get that information from contracts with the third-party payer. The data essentially will corroborate the extent to which those contracts for different groups of -- you know, I'm talking about across third-party payers getting contracts from these different groups is found in the reimbursement area.
Q. How do you know that? Have you talked to any payers in connection with this case about their reimbursement data?
A. Because I've done it in other cases and talked to third-party payers in other cases.
Q. You would agree with me, wouldn't you, that

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it would be helpful to talk --
A. Sure.
Q. -- to the payers?
A. Yeah, but it's unnecessary, but it would be helpful, and I would want to do it.
Q. There are some contracts which reference AWP in part but not in whole; is that correct?
MR. SOBOL: Objection to form.
A. Yeah, I don't understand what you mean.
Q. Well, I guess maybe I should get a better understanding of what the claim is here. When you say that the class will consist of payers who pay for prescription drugs where the contract expressly referenced AWP, what if the contract references things in addition to AWP?
A. Well, you will usually see the contracts relating reimbursement on branded and generic drugs with a percentage off of AWP, and -- for the generic drugs and -- for the generic drugs. Let's not talk about multisource branded at the moment. There is

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clearly reference to AWP less a percentage or usual and customary, or there is a third-party payer's version of MAC, which is usually expressed also as percentage off of AWP, but just a larger percentage off of AWP.
Q. How do you know that?
A. Because I've seen the pro forma contracts.
Q. Which pro forma contracts?
A. I cite a variety of them in my declaration. Okay. In Attachment D, Footnote 39 I cite a variety of contracts, pro forma contracts and specific contracts, with some of the named plaintiffs. The Bates numbers are included therein. There are Bates-numbered documents and versions of contracts in Footnote 49. I have also reviewed and remember seeing, since I've written this, contracts between GSK and Diversified Health Services with ESI that have also related reimbursement and rebates in particular to AWP -- I'm sorry, not reimbursements, just

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rebates to AWP.
So I've seen contracts all of -- all the extent to which have been based on these notions of AWP.
Q. Have you ever talked to a PBM about how they go about establishing MAC pricing?
A. I have talked to third-party payers that at one time had been -- acted as PBMs, but I haven't done it as thoroughly as I plan to during the discovery process here.
Q. And are you aware of the fact that each PBM has its own unique MAC price list?
A. It's my understanding that they purport to have their own.
Q. And are you aware of the fact that AWP is only one factor that PBMs consider in establishing their Mac price lists?
A. Well, in the contracts I looked at, the MAC price was expressed entirely as percentages off of AWP, but it was also related to the mix of the generics that were being used as to what the percentages would be and what

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the ultimate percent off of AWP would be on average.
Q. Well, if there are PBMs that base their MAC price lists on a variety of factors in addition to AWP, including subjective factors, would the drugs that were subject to that price list be out of the case?
A. No. They're still related to AWP.
Q. So how are you going to go about determining the impact of AWP on the price of those drugs?
A. I'm going to be able to look at claims data relative to that PBM and through statistical analysis see how -- for which drugs there is different deviations and different percentages off of AWP.
Q. So even if in practice the PBM didn't consider AWP at all in setting a MAC price, if you can, by observing claims data, demonstrate a relationship between AWP and the MAC price, in your view, the MAC price will have been part of the scheme?

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A. Well, if the contract explicitly says, as it does in ESI's case, that it is a discount off of AWP in whatever form, you know, there's no further discussion. If the contract is mute about that, the data -- if the data demonstrates a relationship to AWP, there is -- it's either -- those reimbursement rates are either related to AWP or to something else, and that will be subject to the analysis that will be conducted as I examine the claims data and the contracts.
Q. And isn't the data always going to have a relationship to AWP?
A. If reimbursement rates are always related to AWP, then, yeah, it will always have a relationship.
Q. Your age is going to have a relationship to AWP?
A. Not really. Not for some --
Q. I could --
A. I'm willing to bet you I can give you a list

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of generic drugs where the AWPs are flat, they're constant for 10 years. Take a look at the ones for Prozac. And my age is going up.
MR. SOBOL: Maybe you got something there.
A. So the correlation is not particularly good. Maybe with branded drugs you're right, but it's going to differ by drug. You know, this is subject to the analysis.
Q. Let's go back to your declaration at Paragraph 33.
A. And do we have a specific context?
Q. Page 24.
A. Is it the main body?
Q. Yes.
Now, for PBMs you say that the but-for spread for single-source is 16 percent to 33 percent and the but-for spread for multi-source is 10 percent to 20 percent; is that correct?
A. What I say is that based upon -- beginning

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of that sentence in Paragraph 33 -- well, let's start at Paragraph 32. Well, let's start on Paragraph 31. That's why you need to read this stuff in context. Paragraph 31 says, "The information discussed above," which is a variety -- which has to do with a variety of these surveys and also what seems to be the oral tradition about relationships between AWP and WAC and RAC, the retail acquisition cost, that in Paragraph 31 I say, "The information discussed above demonstrate the yardsticks can be calculated for market expectations between AWP and ASP. The information discussed above is preliminary only and subject to the caveats introduced and discussed. This information will be supplemented during my damage analysis with actual AWP and ASP data," et cetera, et cetera.

Paragraph 32, "Once these permanent yardsticks are refined through further analysis and discovery, the analysis will

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proceed as follows," and there it talks about that. Paragraph 33 starts out, "Based upon the preliminary information presented above, and to be supplemented by other survey information, additional discovery and analysis of other yardstick drugs, the preliminary estimates of the but-for spreads for the groups of market entities identified in Paragraph 28 are the following."

So given those provisos and the fact that this is illustrative, yes, those are the spreads, but I'm not sitting here now saying that's the spread that's going to inform the ultimate measure of damages in my damage amount. I've merely pulled together a variety of estimates from the lowest to the highest in these -- in Paragraphs A through G and put them next to the different groups.

Q. So you're saying that for now the judge should ignore the numbers?

A. No.

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Q. The numbers could be as high as 80 percent?

A. No. I'm saying this is based on information that is a not insignificant amount of survey information, but I'm -- before I'm going to commit myself to something as important as actual damages, I'm going to want to confirm and refine these estimates. They may be lower. They may be higher.

Q. Okay. And how did you calculate these numbers?

A. I calculated these numbers as explained in Paragraph 30 line by line for the different groups of drugs.

Q. You calculated them from the government surveys?

A. From the government surveys in Paragraphs A, B, C and D. I take the government surveys. I add on some anecdotal information about -- what's going on with this thing here? Oh, this -- the copy that I'm reading here has got typos. Paragraph B of -- I'm sorry, Paragraph 30B -- and we sent you a PDF --

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second sentence starting, "While I have found the total rebates vary from 4 to 8 percent. For simplicity let me assume that the market understands that rebates amount to approximately 5 percent of AWP." Those two periods should be an approximately equals sign, a little squiggly equals sign, and then the same thing with the two dots before the 0.05 AWP.

So I don't know -- those did not appear in my version of the document, and I'm not quite sure why they're here.

THE WITNESS: (Indicating.)

MR. SOBOL: Very interesting.

A. So you're handing me a mickey here?

Q. This is what we got.

MR. SOBOL: It's not different from the one I have in my hand.

THE WITNESS: And did they just give you that, or did that come from us?

MR. SOBOL: No, this came from them today.

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A. Oh, you rascals. Okay. Well, in any case, it doesn't matter. Do you have squiggly lines or dots?
Q. I have dots. I have never had anything but dots.
MR. MORGENSTERN: I have squiggly lines.
MR. SOBOL: I have squiggly.
A. They should be squiggly lines, so please refer to the squigglies. That's why I got confused reading this.
MR. MORGENSTERN: It's a function of which version of Adobe you have.
A. And you say the pharmaceutical industry is complex. Look at computers and look at the class actions of computers.
Okay. So the -- are we getting ready to like have high tea?
MR. SOBOL: It is a question. You're answering a question.
A. I have merely pulled together the information from surveys as cited in

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Paragraphs 30A through 30B -- D. I have taken the regulatory language for Medicare Part B for 30E. 30F and G merely take some basic understandings that I have seen from contracts, and as I've talked to people in this market about what reimbursement rates are related to AWP, and I've taken those to come up with some measure of a relationship between AWP and ASP.
And given those paragraphs, 30A through G, for each category of drug when I put the spread here of summarizing the spreads, I took the lowest number from all those paragraphs and the highest just to give the range found in the expository efforts in Paragraph 30 with the existing survey information that is real information that is good information as a beginning to inform these yardsticks.
Q. And one of the things you come up with is spreads for single-source drugs that are greater than spreads for multi-source drugs,

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correct?
A. That's correct.
Q. Isn't that counter-intuitive? Wouldn't you assume that the spreads for multi-source drugs would be greater because there's more competition in connection with those drugs?
A. The multi-source spreads, I essentially took the spreads from the earlier OIG reports, and those were essentially 10 to 20 percent range. You know, I'm not -- the individual exact estimates were somewhere in between. And that was for branded and generic drugs. I had further information -- I took into account in this multi-source branded drugs they stopped paying rebates once a generic launches, and the -- and I took account of some other formulaic relationships for branded drugs that expanded and changed the spread range for the single-source that did not show up in the multi-source. And that's all explained in the -- in Paragraph 30, the reasons therefrom.

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Q. Are you saying that you used the 1992 OIG report to come up with your spreads for single-source drugs for PBMs?
A. I am saying that I used all the information that I saw prior to the survey information that was presented in the later '90s as the basis for the but-for spreads as the -- in this illustration.
Q. So you're --
A. As we discussed --
Q. So you're not able to tell me -- you're not able to point to a particular document that you used to come up with the 16 percent to 33 percent but-for spread for single-source drugs?
A. Okay. Let's do this here: If you go to Paragraph 30B, and I talk about the OIG reports, and I talk about using the ones -- the reports prior to '97. Those suggest a relationship between -- they report the spread as a percentage of AWP. I want to report it as a percentage of ASP. So it's

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just a rearrangement of numbers, but I take the spread there from those reports. I take the broadest range of the numbers I found, .91 to .83 AWP. I assume that there are some rebates paid that would be reflected in the ASP. I make an assumption about the range of rebates that I have seen in other matters for single-source branded drugs. And based on that, I come up with a range of a relationship of ASP to AWP of what you see, and then a resulting spread for the but-for AWP is 1.16 to 1.28, okay?

So now that's from the OIG reports prior to '97 where I've taken the lowest amount --

Q. Well, you --

A. Why don't you let me finish. And so I've got 1.16 to 1.28. Now I do another exercise here where in G I say, look, there's also this understanding as you talk to people in the industry relating to reimbursement rates and retail acquisition costs that lead me to

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a measure of -- that the AWP relationship to ASP is 1.33. So I said, look, I'm going to -- for now I'm going to take the broadest endpoints of this range, 1.16 in B and 1.33 in G, and that's the 16 percent to the 33 percent.

Q. All right. You cite three OIG reports prior to 1997 -- the 1984 report, the 1989 report and the 1992 report, correct?

A. I do.

Q. And the 1984 report and the 1989 report both combine generics and brands, correct?

A. That's correct.

Q. The only report that breaks out brands is a '92 report, right?

A. The '97 and then the 2001, 2002 -- the 2001, 2002 break out the brand and generic.

Q. Are you saying now that you did decide to use the '97 through 2002 reports to arrive at these yardstick spreads even though you testified earlier that you thought they were contaminated?

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A. Whatever that question was the answer is no. What I've --

Q. Well --

MR. SOBOL: I'll move to strike that.

Q. Here's my point, Dr. Hartman: What you've done is you computed a yardstick spread for single-source sold through PBMs based on an OIG report that deals with oncology products; isn't that what you've done?

A. The OIG reports that are in B are not oncology products. That's in A. That's the '92 report. That's the chemotherapy drugs in A.

Q. Okay. So you're saying that --

A. I'm using B in the OIG reports, and it says that -- this is as -- we've walked through already in Attachment D where I cited all the OIG reports, you know, from 1984 through the 2001, 2002. I've admitted to the increasing spreads that we're seeing in the surveys that are in the 2001 and 2002

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reports. And as I discuss in detail, and we've read it into the record in Paragraph 21 of Attachment D, why I didn't -- why those were in Paragraph 21D. Given the allegations in this matter, the more recent and larger spreads reflect the scheme to an unknown extent and are contaminated to an unknown degree or the use of yardsticks for non-fraudulent behavior. We spent an hour discussing why I did that.

Q. So did you --

A. So this is here -- all I'm doing is taking exactly what I did back there and using those yardsticks here.

Q. Did you or did you not use the 1997 through 2002 reports in arriving at the 16 to 33 percent spread for single-source?

A. No.

MR. SOBOL: Objection.

Q. Did you or did you not --

A. I did not.

Q. -- yes or no?

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You did not, okay.
A. It says from the OIG reports prior to '97. It's --
Q. So the only one available for you to use prior to '97 for single-source was the 1992 report, correct?
A. Which 1992 report -- are you talking about -- there's an '84 report. There's like an '87 or '88 report. The '92 report is on chemotherapy drugs, which I'm not including there. That's in A. There was also a '94 survey that had for single-source drugs a measure very similar to this 10 to 20 percent.
Now, you know, if you would like me to sit down and do a taxonomy of where each one of these OIG reports come in to each yardstick and where they appear here, I would be glad to do that, but right now we're just --
Q. Is it your understanding --
MR. SOBOL: Well, let's take a

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break. It's 4:00.
MR. EDWARDS: Okay.
MR. SOBOL: We've been going for two hours straight.
MR. EDWARDS: Fine.
(Recess taken.)
Q. Earlier in your deposition we talked about the authorities you cite in Footnote 32 of your declaration as a basis for your methodology.
A. I'm sorry, wait. Footnote 32 of the report?
Q. Of the report.
A. It's -- I think that's not the right footnote.
Q. Okay. Then I misremembered it. You're right.
A. It's Footnote 24.
Q. Footnote 24?
A. Yeah.
Q. Do any of those authorities purport to calculate a but-for list price for purposes of determining impact or damages?

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A. Again, the authorities -- the scientific papers cited therein merely allude to analogous types of research that gets at the way the world might be absent certain events. Now, whether they get list prices -- so I say that merely to say I'm not basing my methodology on their stuff, I'm just saying this is -- what I'm doing is similar to what they do but for different reasons.
Now going to your question about list prices, I would have to go back and review all of them to see whether they did. I couldn't -- most of them are focusing on reimbursement rates using IMS data.
Q. Are you the first person that you're aware of that has attempted to develop a methodology for calculating a but-for list price?
A. I wouldn't know.
Q. And is it fair to say that because you are calculating a but-for list price as opposed

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to a but-for transaction price, you are required to get into the subject of market expectations, correct?
A. Well, to the extent that I am taking the following facts as given, that AWP is a benchmark in this industry and that it's a signal to various people for various related prices, yes, I need to have some understanding of what people understood what that was a signal for.
Q. We were talking a moment ago about single-source drugs, and am I correct in understanding that at the beginning of the distribution chain single-source drugs are sold by manufacturers to wholesalers?
A. They are usually sold through wholesalers, that's correct.
Q. And usually at WAC?
A. They're usually sold to the wholesalers at WAC, that's correct.
Q. And then the wholesaler may sell those drugs to a pharmacy at WAC plus a markup?

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A. Well, usually the manufacturer negotiates contracts with a variety of the distributors that we're talking about, like a retail pharmacy, and whatever that final price will be will be negotiated off of AWP, which it means the same thing in some relationship to WAC. And whatever that turns out to be, whether that price is less than WAC or more than WAC, the manufacturer either debits or credits the wholesaler with a chargeback to make them whole for their purchase at WAC.
Q. Is it your testimony that manufacturers enter into contracts with pharmacies with respect to single-source drugs? That's your understanding of the industry?
A. My understanding of the industry is that manufacturers enter into contracts with a variety of entities, PBMs and with others, and the extent to which they are contracting with the retail pharmacies I would have to confirm.
Q. Well, is it correct that generally the

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wholesaler will sell the drug to a pharmacy at WAC plus a markup?
MR. SOBOL: Objection. Are we still on single-source?
MR. EDWARDS: Yes.
A. It is my understanding that -- and now whether we're talking about single-source or multi-source or generic, let me step back from that and just say the following: that manufacturers of all of those drugs or some subset of those drugs will negotiate the prices with the -- with retail pharmacies. To the extent that it is single-source branded drugs where the contracts are not with the PBMs and they might be directly with a CVS, I would have to confirm those in the contracts.
I can't quite recall the extensiveness of those contracting -- of the contract. But the final answer to the question is, those contracts on whatever the drugs are are usually some percentage off of or

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related to WAC or AWP since they are formulaically related to one another.
Q. Well, let's assume that I am correct that manufacturers rarely discount single-source drugs, okay? Just take that assumption for a moment.
A. That they rarely discount?
Q. Single-source drugs. And let's assume that they sell single-source drugs to wholesalers at WAC and then WAC sells those drugs -- I'm sorry, then wholesalers sell those drugs to pharmacies at a markup over WAC. You with me so far?
A. Yeah.
Q. And let's say that there is a fairly constant relationship between WAC and AWP. Is that your understanding?
A. That's my understanding.
Q. The publications arrive at AWP by marking up WAC by 20 to 25 percent; is that your understanding?
A. My understanding is that various drug

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manufacturers either report AWP and a formula for WAC or they report wholesale list price, which is WAC, and then the formula for AWP or they report both. But essentially those two list prices and the formula relating them is controlled by the manufacturers.
Q. Is it your understanding that WAC is reported by the publications, correct?
A. WAC is reported by the publications to the industry. They are set by the manufacturers.
Q. Well, if a payer understands that single-source brands are rarely discounted and there is a constant relationship between WAC and AWP, wouldn't the relationship between AWP and ASP be reasonably predictable in that case?
A. Well, the relationship -- I mean, if -- assuming -- I mean, your question or your hypothetical is assuming all prices are related in the same way, wouldn't it be the

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case that all prices are related in the same way? The issue is that the extent to which there are discounts off of certain drugs, single-source drugs, is something that is -- while they're within a certain range, I can't say they're the same for all single-source drugs. I've seen variation in invoiced discounting and various kinds of price offsets in addition to chargebacks that make them whole with WAC. And there are rebates that vary across drugs.

So there is a range of expectations that is out there, and that is based -- that I -- that the -- that I have assumed the market relies on, but there's variation within it, and it would be used to a competitive advantage to move branded drugs if that difference between the AWP and the ultimate ASP as appearing through, in addition, rebates, was sufficiently greater than others.

Q. Is it your understanding that rebates are

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paid on branded drugs that are subject to patent protection? Is that --

A. It is my understanding.

Q. Is that your understanding of the way the industry operates?

A. It is my understanding that rebates are paid on innovator drugs generally until near or shortly after generics launch.

Q. Why would a manufacturer do that if a branded drug subject to patent is not facing any competition?

MR. SOBOL: Objection.

A. Your -- first of all, you might want to ask your clients why they do it, because they do it. And I assume it makes good business sense to do it, and I assume that they're maximizing something in doing it and --

Q. Well, if you're incorrect --

MR. SOBOL: Have you finished with your answer?

THE WITNESS: I am.

Q. And, in fact, they don't do it?

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A. That they don't offer rebates?

Q. They don't offer rebates, or it is -- typically they do not offer rebates or discounts on innovator drugs that are subject to patent protection. Does that affect your opinion?

A. Well, my -- you're asking opinions going to ultimately the quanta of the effects. My opinions so far, as laid out here, go to causation and to impact and to injury and to damages. In going to -- that's all -- that's a class-wide type of analysis. That's a class-wide conclusion.

I've put together illustrative examples of how one would look at, use the analysis that I put forward once impact is established and injury is established, and lo and behold there are certain NDCs where they do not exceed the illustrative upper ends of my spreads. And I say in my -- in the declaration that this may be a case where these were -- drugs were either not

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subject to these particular NDCs, were not subject to the scheme or where the manufacturers felt that the scheme targeted at this group was not particularly effective and the scheme was not used there.

Q. So there would be no damage with respect to that particular drug, correct?

A. The quantum of the injury would be zero for that drug should it be -- should it not be greater than what the but fors would suggest.

Q. And if a particular class member purchased only that particular drug, then the quantum of injury for that class member would be zero as well, correct?

A. Well, at the time -- I assume should this go forward and I do a damage methodology, I will be able to, as I've demonstrated in Tables 3A and B and 2A through 2C of the declaration, that for certain NDCs for -- I haven't really identified these by quarter, but that the data will allow that. And

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there could be certain NDCs where it's not reached the threshold of what the but for would be, and if someone came forward with a claim for a purchase of a drug -- for that drug during that period of time, the amount of the injury would be zero.

Q. You know, I wanted to ask you a little bit about Table 3. Take a look at Table 3A, which is Vepesid, V-E-P-E-S-I-D, a Bristol-Myers Squibb drug. In Column 6, I believe it is, you have the number of units?

A. In Column 6 I have the installation -- the but-for -- the AWP inflation. Column 7 has the units sold.

Q. Okay. How many of those units were sold pursuant to contracts that expressly mentioned AWP?

A. That I will ascertain more fully when I see the contracts of third-party payers. From what I have seen of the contracts to date, all or substantially all of them were sold subject to AWP.

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Q. But you would have to exclude from this number contracts or units that were sold pursuant to contracts that did not expressly reference AWP, correct?

A. The definition of the class is you belong in the class if the reimbursement rate you paid was related to AWP, and so to the extent that in the damage analysis I'm able to identify a subset that -- where there are sales, a certain amount not subject to AWP, that will be net the out.

Q. Do you know what percentage of these units were sold to hospitals?

A. Not yet.

Q. Would it surprise you to know that more than 50 percent were sold to hospitals?

A. I don't think it would surprise me.

Q. Okay. And is it your understanding that contracts with hospitals typically do not reference AWP?

A. That is my understanding.

Q. Now, Vepesid is a Part B drug, correct?

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A. I would assume it is.

Q. And Part B drugs are reimbursed pursuant to J codes, not NDCs; is that correct?

A. They -- J codes are used. I would have to confirm that.

Q. So in order to make this calculation, you would not only have to take out hospitals, but you would have to figure out how to differentiate between units sold in the private sector and units sold in the public sector, and then you would further have to figure out how to deal with the fact that units sold in the public sector are priced pursuant to J codes as opposed to NDCs, correct?

A. What I would have to do here is exactly what I did in the Lupron declaration that you've -- I think you've had me look at or we've cited. Yeah, I mean, there are ways to do that allocation. There's data to break out those distributions, and I would -- the notion of having to do it by J

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code, that I do not think is the case, but it would be something that I would examine at the time of damages.

Q. And the reimbursement -- I'm sorry, and the -- with respect to units that are sold under Medicare Part B, the plaintiffs in this case are only making claims on behalf of persons or entities who made co-payments, correct?

A. That's right.

Q. So that would be 20 percent of the allowed amount, correct?

A. That's correct.

Q. And you haven't made that calculation here, either?

A. No.

Q. And if there were situations that a purchase was covered with -- by Part B but the provider did not base its charge on AWP, in other words, the provider charged less than AWP prior to 1997 or less than 95 percent of AWP after 1997, you would have to figure

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that out as well and exclude those purchases from the class, correct?
A. Well, what I would need to do is I would need to do an analysis of at what percent of -- I'm hearing you say that they didn't do it at 95 percent or at AWP. I would need to do a review of the claims data or whatever information that I'm going to have to turn to to see if it was a percentage of AWP and related to AWP. And then that would determine whether they would be included or not.
Q. So you're saying that with respect to a purchase under Part B, even if the provider billed Medicare at 50 percent of AWP, the plaintiffs would still have a claim for 20 percent of that 50 percent?
A. Well, if the practice of a provider was to bill at 50 percent AWP, it's a price with respect to AWP, and if that AWP is inflated relative to a but-for AWP, then the reimbursement should have been 50 percent of

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the but-for AWP.
Q. Well, how are you going to figure out whether the provider in fact based his or her charge on AWP? You would have to talk to the provider, wouldn't you?
A. I'm going to have to see the -- either the claims data -- I'm going to have to look at the same kind of data and data sources that we've talked about for the other -- for the orals.
Q. You have to see the provider's contract, right?
A. I would assume the contract -- since it's Medicare Part B, whether -- I mean, this is a legal question. I'm not even sure whether under Medicare Part B, given the fact that the reimbursement is supposed to be at AWP, 95 percent of AWP or at least costly alternative or the estimated acquisition cost, I'm not sure that there is a contract directly in that regard as to the co-pay, but something has to be reported, and, you

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know, I'll have to confirm what that is.
Q. Well, let's suppose you're looking at a charge, and it's 50 percent of AWP.
A. Uh-huh.
Q. How do you know that the provider based that charge on AWP as opposed to just coming up with a number that happened to be 50 percent of AWP?
A. Well, that provider will have information -- I mean, suppose we're talking about an oncology group. That oncology group will be administering a wide variety of Medicare Part B drugs, and the -- that's information that I will want to look at and see -- if he's billing everything at 50 percent AWP, it's telling me something about the percentage off of AWP. If he's billing randomly and there is no relationship to the AWPs of all the drugs that he's administering under Medicare Part B, well, then apparently he's not. If there's no statistical relationship, then he's throwing

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darts, and that would not be somebody that would be in the class.
Q. But you would have to look at provider data to get at that, correct?
A. I would --
MR. SOBOL: Objection.
A. I would identify a sample of types of providers to analyze -- a representative set of providers to analyze how they're doing their pricing.
Q. Would there also be a situation under Medicare Part B that the co-payment was being made under Medicare + Choice?
A. There probably would be.
Q. And is it your understanding that co-payments made under Medicare + Choice are not based on AWP?
A. The payments under Medicare -- I mean, that's Medicare Part C, is what you're talking about, pro choice. Those are contracted out to specific managed care organizations, and I would assume I would be

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looking at the contracts of those managed care organizations to see what precisely were the reimbursement practices.
Q. But if they're not based on AWP, then that particular transaction would not be in the case, either, correct?
A. Well, by the definition of the class, any transactions or groups of transactions characterized like sales to hospitals that are not reimbursed, that are capitated and not reimbursed by AWP or other groups will, upon examination, if they're not related to AWP, they won't be part of the class.
Q. And if the government is the insurer for the co-payment, that would not be part of the class, either, right?
A. That's my understanding.
Q. And there would be many cases, I take it, in which the patient would have insurance to cover that co-payment, correct?
MR. SOBOL: Objection.
A. You're talking about Medigap insurance?

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Q. Medigap insurance.
A. Yes, there will be cases of that.
Q. And so you would have to look at the terms and conditions of that Medigap insurance to see whether the co-payment was based on AWP, correct?
MR. SOBOL: Objection.
A. The types of drug reimbursement plans and Medigap plans that exist are also a limited set of types of arrangements that one can apprise oneself of by looking at a sample of them. So, yes, one would look at those -- that type of insurance the same way that I would sample third-party payers generally for the non-governmental-related reimbursements on any type drug.
Q. And you would also have to determine whether or not a co-payment was even made, correct? There might be cases in which the doctor didn't collect the co-payment?
A. It is my understanding that that's -- that that is a legal question.

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Q. Well, if the co-payment is not made, then there would be no impact or damage, right?
A. In extrapolating from my experience in Lupron, it is my understanding that the co-payment was -- that oncologists were required to bill it, and I was -- I took an assumption from counsel interpreting that stat -- that regulation. I assume I'll be given instructions regarding that situation in this case.
Q. Well, if it turns out to be the case that there are situations in which the provider just doesn't collect the co-payment, then that's something you have to figure out, right?
MR. SOBOL: Objection.
A. I haven't --
MR. SOBOL: Asked and answered.
A. Yeah, I mean, I've -- there's too many things yet for me to be informed about in terms of the legal theory and issues to know whether that needs to be --

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Q. Have you determined how many NDCs and J codes you have to make all these calculations for?
A. Well, first of all, I wouldn't do it by J code just because J codes are combinations of NDCs and we can work with the NDCs, so you might as well work with the microdata right off the bat.
Q. But in order to determine the Medicare Part B co-pay, you need to figure out what the J code is, right?
A. Well, no, the Medicare Part B -- the J code translates into NDCs, so I'm just going to go from -- I can go straight to the NDCs applied in those J codes, and I'm going to work with the NDCs as I have here. J codes mix together too many NDCs to be of any real precise unit to really start to do the analysis at.
Q. Well, what's the AWP in those situations, then?
A. The AWP is an AWP for the NDC.

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Q. But you've got multiple NDCs in a particular J code.
A. Well, you've got --
Q. So you have multiple AWPs, right?
A. You've got amounts of units of NDCs sold -- if I've got one J code that has 10 NDCs and they're all sold at, you know, the various ASPs for those NDCs, which I could calculate and I have calculated, and they're indicated in these tables here, and I've got an AWP, I can have a spread for each of those NDCs. And it may turn out that within a J code that has seven NDCs there's going to be -- I'll be able to be precise for the NDCs within that J code.
Q. But you're going to have to have -- you're going to have to look at 10 or seven or however many NDCs you have AWPs, right?
A. Yes. It's easy. It's right here (indicating). It's in these tables. Working with NDCs is very easy.
Q. Now, I want to go back to brands subject to

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patent sold through PBMs or purchased through PBMs. Would you agree that for most brand-name drugs still covered by patent that the relationship between actual transaction prices and AWP is reasonably predictable?
MR. SOBOL: Objection.
A. I would say that the information that I have reported as the preliminary basis for yardsticks has suggested a certain range of predictability, and to the extent that there are deviations from that, and to the extent that the AWP scheme influenced those drugs remains to be seen from the analysis.
Q. But if the relationship is reasonably predictable, then you wouldn't have a fraud or causation or impact with respect to that particular drug, correct?
MR. SOBOL: Objection.
A. If the relationship were reasonably predictable and didn't lead to the types of allegations that are arising in this case,

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you wouldn't have the states of Vermont and New York suing ESI for not sharing with them all of the price offsets that have been paid for certain drugs. There would be full transparency.
Q. And you think those lawsuits are brand-name drugs still covered by patents?
A. I think those lawsuits are about the lack of transparency and understanding of all of the price offsets paid by branded and generic manufacturers for their pharmaceuticals. I'm sorry, those lawsuits are related to all branded and generic pharmaceuticals sold by those manufacturers, reimbursed by reimbursement rates related to AWP.
Q. I want you to take a look at the Schondelmeyer declaration once again.
A. Do I have it?
MR. SOBOL: No. That's not it.
THE WITNESS: I know. I was going to give that back to you.
Q. (Hands document to witness.) I want you to

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take a look at Paragraph 89. The second sentence says, "For most brand-name drug products that are still covered by patent or exclusivity terms the price relationship between list prices, AWP and WAC and actual transaction prices (actual acquisition costs or average selling price) for a given class of trade is reasonably predictable."
Do you agree with that?
A. Well, I agree with it to the following extent: that I think it is relative to physician-administered drugs and to multi-source innovator drugs and to generic drugs. I think that is correct if that's what he's making it reasonably predictable relative to.
Q. And --
A. That's as far as I would go with that.
Q. Two sentences down he says, "In such occasions a payment policy using AWP as a benchmark (e.g. usually AWP minus a certain percent) may be relatively accurate."

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Do you agree with that?
A. I will only be able to agree or disagree after I've done the damage analysis.
Q. And it follows from that that if using AWP as a benchmark is relatively accurate, then there would not be any impact or injury, correct?
MR. SOBOL: Objection.
A. You keep coming back to this, and the impact and injury and causation is there for all drugs sold at a price based on the AWP. The size of the injury or impact, if this turns out to be true -- these numbers are close to yardsticks that I've tentatively put forward. And if they turn out to be true, then they're -- for those drugs, the quantum of that injury will turn out to be zero.
Q. Now, in determining whether a particular customer of a PBM has been injured, would you want to look at that customer's contract with the PBM?
A. Now you're talking about when we get to the

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claims administration phase of the litigation?
Q. No. I'm talking about at trial in this case.
A. Are you talking about dealing at trial with issues of causation and impact?
Q. Yes.
A. No, we wouldn't.
Q. You would not look at a customer's contract?
A. Well, I would look at it -- if someone comes forward and they have a contract that I says I'm buying this stuff at $10, period, there's no mention of AWP, I would look at it to that extent. If someone came forward where the contract had not mentioned AWP, they would not be members of the class. Otherwise, that's all I would need to know whether there was an implicit or explicit contract such that reimbursement rates were related to AWP.
Q. By the way, have you ever testified about your formulaic methodology at an actual

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trial?
A. I've testified about --
MR. SOBOL: Actual trial?
MR. EDWARDS: Yes.
A. As opposed to a but-for trial?
Q. A mock trial. You're dealing with the American College of Pretrial Lawyers here, except me.
MR. SOBOL: I've never heard of that. That's good.
A. I have testified at trial and before administrative law judges for or about formulaic methodologies not unlike this, getting at other industries and other impacts.
Q. Not about the pharmaceutical industry, though, I take it?
A. Apparently that's in the works, but not yet, no.
Q. It's in the works? Which case?
A. Have I already mentioned this? I guess I have. Cipro California.

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MR. SOBOL: C-I-P-R-O.
THE WITNESS: Oh, I thought you were talking to me.
Q. You've looked at some ESI contracts?
A. I have.
Q. Have you looked at any Caremark contracts or Medco contracts or Advance PCS contracts?
A. You know, I've put forward in the declaration some Advance PCS presentation materials. I think I have looked at them very quickly, but not closely enough to have relied on them. I mean, I just had a pile of contracts, and I focused on one set because I had a complete set, and -- of the ESI materials.
Q. And have you observed that those contracts typically have prices for branded drugs?
A. They usually -- the contracts for ESI are -- the contracts for ESI --
Q. For PBMs generally.
A. Well, PBMs generally state that the price, the reimbursement rates on the part of the

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third-party payers will be AWP less XX percent to be negotiated or at UNC, or I guess ESI doesn't call it MAC, they call it something else, maximum reimbursable amount or something, MRA. So, yes, I've looked at that.
Q. And these contracts have provisions relating to rebates?
A. I don't -- I would assume -- oh, yeah, they do. Some of them do. I'm trying to think whether it was a separate set of contracts or not. Or no, wait. Actually, I'm confused. I'm not sure whether it's the manufacturers' contracts I'm thinking about or the PBMs' contracts, so I want to defer. I would have to go back and look it up. I've seen too many contracts.
Q. Contracts between payers and PBMs have provisions relating to dispensing fees?
A. They do.
Q. And clinical service fees?
A. They do.

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Q. Transition fees?
A. There's a -- you can name a laundry list here. There are many services that PBMs provide, and they -- maybe you know -- not all of them will offer all of these services, but there's a vast amount of formulary design and network formation and various services and drug utilization, et cetera.
Q. And administrative fees, have you seen those in contracts?
A. I know that there are administrative fees.
Q. And do you know whether there are trade-offs between and among these factors or these variables in the negotiations between payers and PBMs?
A. I would certainly assume there was.
Q. And don't you need to consider those trade-offs before you can determine whether a particular class member has been injured?
A. No.
Q. Have you ever testified or submitted a

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report in a case involving a bundle of services in which there were trade-offs or variations in those bundles from customer to customer?
A. A bundle of services. You know, I may have, but I can't recall.
Q. Do you recall the Kennett case?
A. Oh, God, you're reaching back into history. Yeah, I remember the name.
Q. What do you recall about that case?
A. That's it.
Q. Well, do you recall that --
A. Here, let me -- I'll inform myself. Let me lack at my CV. It lists all these things.
(Witness reviews document.)
A. Okay. I have informed my recollections.
Q. What do you recall about that case?
A. That was a case involving price fixing among piano movers in the State of Massachusetts.
Q. Involving bundles of services, correct?
A. It involved moving pianos.
Q. And you testified that based on your

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methodology, injury could be determined on a class-wide basis, correct?
A. Well, based on methods not unlike what I have developed in my paper in the Journal of Law, Economics & Organization about the use of hedonic analysis for certification and damage calculations in class action complaints. The methods that I put forward in Kennett were similar to what's in that paper.
Q. And the Court ultimately determined that a class could not be certified because of the variations in the trade-offs among the bundle from customer to customer. Do you recall that?
A. I don't recall how that -- I'm assuming that your knowledge of the ultimate resolution of that case is better than mine.
Q. Well, I believe you already agreed with me that there are trade-offs between and among the various pricing terms of contracts between payers and PBMs, correct?

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A. That's right.
Q. Okay. And so it would follow from that that if a but-for AWP were reported and had an impact on the discount off of AWP in the pricing term, there would also have to be an impact on the other elements of the contract as well?
MR. SOBOL: Objection.
A. I have no evidence upon which to base that conclusion.
Q. Well, are you assuming that in the but-for world the only thing that would change is the benchmark from which the discount off of AWP is calculated?
A. In the but-for world I have been asked to focus entirely upon the impact on prices, and that's what I've done.
Q. How can you determine the impact on prices without also looking at the other elements of the contract as to which there are trade-offs with respect to price?
MR. SOBOL: Objection. You can

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answer if you can.
A. The relationship of the -- or the but-for relationship and the yardsticks upon which the model relies reflect a period of time when there were services being offered of a variety of different types. And the period of alleged violations occurred in a period of time where there were a variety of services also offered, and I am taking the but-for relationship as a relationship between that component of the drugs, the drug component of what's being sold and how it's being sold and then assuming and taking that to describe what it would be in the 19 -- in the 1990s if there hadn't been this -- the AWP scheme.
So that I'm taking information from a period when a variety of services were offered, and I'm applying them to another period when a variety of services were offered, but I haven't taken it to the point of -- I haven't been asked to take to it the

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point of saying would they have changed what they're charging for clinical services in the but-for world. And I haven't been asked to, and I see no reason to.
Q. Well, if the components are interrelated, though, and there are trade-offs among the components, don't you have to take that into account in determining whether there's been impact?
MR. SOBOL: Objection, asked and answered.
A. If the -- in the examples we're looking at, say, in my automobile -- in the paper that's in the Journal of Law, Economics & Organization or in the piano move matter, there were distinct negotiation -- there was a single price offer related to a variety of attributes. That's not the case here. There's a variety of services offered, and there's cost -- there's payments for each of these services. You're paying three bucks for this service, or you run this claims

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audit. It's going to cost this much. And all of these are priced out, and drugs are just one of merely a set of the practices that are all priced and priced with reflection to the services that are offered such that I do not believe that the -- well, period.
Q. Well, I mean, let's take ingredient cost and dispensing fee. If the price for the ingredient cost goes down, wouldn't it be logical to assume that the price for the dispensing fee will go up?
A. It is possible, and I don't want to say that it's probable, but it is possible that in the but-for world in the illustrative examples that I've given that the percentage off AWP might be different or the dispensing fee might be different. And to the extent that that's -- there is evidence to support that finding, they can be accommodated by this analysis and by that calculation.
Q. So you would have to look at each of the PBM

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contracts, consider the relationship among all of these components as to which there are trade-offs, and then take all of that into account in doing your analysis in this case, correct?

A. No. I would take into account the pharmaceutical benefit plans that are being offered, which are summarized fully in the claims data where they identify -- normally they identify AWP, they identify the reimbursement amount, they identify the co-pay, they identify the dispensing fee, and I will be able -- to the extent that that proves to be something that needs to be looked at, I can see whether co-pays or dispensing fees may vary in a but-for world, whether they were different, whether they -- in your conjecture they went down because these spreads went up as part of the conspiracy.

Well, I can go back into the '80s and check that hypothesis out. That's a very

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straightforward thing to assess and to accommodate within the damage model.

Q. You think you're going to have a lot of PBM contracts to look at from the '80s in order to make that assessment?

MR. SOBOL: Objection.

A. You're not hearing me. I'm not saying contracts. I'm saying data.

Q. You think you're going to have a lot of PBM data from the 1980s?

MR. SOBOL: Objection.

A. I'm going to get as much data as I can get.

Q. Do you have any understanding as to when the PBM industry came into existence?

A. In the 1980s.

Q. When?

A. When was the first PBM issued the first contract? Sometime in the 1980s.

Q. As I understand your theory, if a customer has a discount of AWP minus 14 percent in the actual world, you're assuming that they're going to get that same discount off

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of AWP in the but-for world?

A. For the simplistic illustration that I've put forward in Equations 1A through 2B I have kept the discount off AWP and the dispensing fee to be the same in the actual world and the but-for world. To the extent that I find, just what I'm saying, they can easily be made to differ. And this difference will be modified slightly but very slightly.

And I can put in -- I can put in the subscripts right here and come up with the differences and do statistical analysis drawing from claims information to see, given whatever data is available, how those measures of percentages off of AWP or dispensing fees varied pre and during the conspiracy period to the effect that they varied at all.

Q. So you think the discount off of AWP could very well be different in the but-for world?

A. I have not done any research to conclude

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that.

Q. And the only thought that you have at this point as to how you might do that research is to look at a period of time pre-1991?

MR. SOBOL: Objection. Is there a part of the report you're talking about?

MR. EDWARDS: No, there isn't.

MR. SOBOL: I'm lost.

MR. EDWARDS: There isn't part of the report talking about that. That's why I'm asking the question.

MR. SOBOL: No, I'm asking if you were talking about a part of the report. I'm sorry, go ahead.

MR. EDWARDS: I'm talking about his testimony.

BY MR. EDWARDS:

Q. Can you answer my question?

A. If I can remember it. Actually, why don't you repeat the question.

MR. SOBOL: I think you need to go a couple back.

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(Record read.)
A. Well, let's put it this way: I've looked at reported spreads of the negotiated reimbursement rates off of AWP. Going back, it's my belief I will -- I have seen evidence talking about what the discounts were off of AWP for drugs going back into the '80s and up to the present, looking at contracts that I'm seeing. And they -- and all of them characterize X percent as somewhere between 13 and 17 percent beside -- in spite of the fact that there has been a vast change given the allegations in this matter of -- in the actual world relative to the but-for world as to the AWP. So I'm not seeing a heck of a lot of movement in the numbers you're saying are going to move so substantially to overwhelm this change in AWP.
Now, with expensing fees I've looked at patterns also, but I -- this would be something that I would -- I'm planning to

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confirm during the damage phase to see how those have changed over whatever periods of time for which I can get a hold of those contracts or those kinds of claims data. And I've seen those dispensing fees range from a buck fifty to three bucks. I've not seen any changes in the numbers that you're talking about that could be different, but I have -- there's nothing that seems to indicate to me that they're different in any substantial way relative to the types of overcharges we're seeing implied by the spreads in the -- between the AWP and the but-for AWP which are, you know, in the 50, $60 for some drugs.
So, yes, there's possible -- it is possible there could be some differences. I plan to try and inform this model as fully as to those differences. My initial review of the evidence indicates that they're a second order of importance at most, but they will be something that I will certainly want

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to look at as fully as the data allows me.
Q. Let me make sure I understand your testimony. Are you saying that there would be impact no matter what the discount off of AWP?
MR. SOBOL: Objection.
Q. I mean, let's say, for example, there is a payer that had negotiated a contract with a 25 percent discount off of AWP.
A. And this is in the actual world right now?
Q. This is in the actual world.
A. Somebody we've seen?
Q. Yeah. Would that person have been impacted?
MR. SOBOL: Objection.
A. By the AWP scheme as alleged and as I've taken as alleged?
Q. Yes.
A. Yes.
Q. By 25 percent?
A. No. He's been impacted, but the -- if you look at the calculation, the X percent that is off of AWP doesn't translate into the

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percentage --
Q. You're right. You're right.
A. -- in the reimbursement rates.
Q. What if the discount is 30 percent? Still impacted?
A. To the extent that the actual AWP is larger than the but-for AWP, that produces a wedge in the allowed amount, the reimbursement rate paid by the third-party payer whether the discount is 10 percent, 20 percent, 30 percent, 40 percent, 50 percent, if that.
Q. 75 percent, still impacted?
A. If the AWP is higher and it's -- and the discount -- and the percentage change remains the same in the but-for and the actual world, and that's something that still is subject to the analysis during the damage calculation.
Q. Even if the discount off of AWP were 99 percent, I take it you would say that that payer is still impacted?
A. Can you point to an example to me where the

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discount is 99 percent AWP?
Q. So you're willing to give me 99 percent?
MR. SOBOL: Objection.
A. I'm willing to give you nothing, sir.
Q. That's what I thought. I want to make sure I understand your theory as to this overcharge that results from what you call the AWP scheme.
A. I don't call it that. Plaintiffs' counsel calls it that.
Q. Okay. You wouldn't agree with that, right?
A. No, I would agree -- well, I would just take it as what they have asked me to assume.
Q. Okay. For all you know, we're completely innocent, right?
MR. SOBOL: I could have called it a racketeering scheme here, but I'm trying to be nice.
Q. Let's take a hypothetical situation, if you will, and assume we're talking about a particular drug for which the WAC is a dollar, okay?

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A. Uh-huh.
Q. And let's assume that the markup is 25 percent so the AWP would be $1.25, right?
A. Yeah, if you want to call that the markup. It's the -- that's the relationship between the two list prices, one could call a markup over the ASP. I just want to make sure we're using the same terminology.
Q. And then let's assume that the manufacturer sells the drug to a wholesaler at WAC.
A. Uh-huh.
Q. That would be $1, correct?
A. Uh-huh.
Q. Then let's assume that the wholesaler turns around and sells it to a pharmacy for a markup of 5 percent. That would be $1.05, correct?
A. Can I propose something to help us here?
Q. Sure.
A. We have some materials directly from a PBM that does this example for you, that will just make the numbers easier for both of us

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to follow.
Q. Well, I would like to use my numbers if you don't mind, and then if --
A. Okay. Well, then let me write them down.
Q. Okay. Go ahead. So WAC is a dollar.
A. Okay. AWP is $1.25. Okay.
Q. Then the manufacturer then sells to the wholesaler at WAC?
A. All right.
Q. And the wholesaler then sells to the pharmacy at WAC plus a 5 percent markup?
A. Okay.
Q. And then let's assume --
A. A 5 percent markup on WAC, so it's a dollar five.
MR. SOBOL: A dollar five.
Q. Right. And you would expect the pharmacy to charge the PBM something more than the dollar five that it paid for the drug, correct?
A. I would assume that the pharmacy will cover its costs for the pharmaceutical.

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Q. So let's say that the pharmacy charges the PBM AWP minus 15 percent. If my calculations are correct, that would be $1.06?
A. Where's my calculator? Can I trust this man?
Q. I had a calculator.
A. I knew you were going to do that to me, so I brought one along. So you're saying, I'm sorry, they sell it to the PBM at AWP less -- what was it?
Q. At 15 percent.
A. Okay. So it's, as you said, a dollar six three, a dollar six.
Q. And then let's say that the payer pays the PBM or the PBM charges the payer AWP minus 14 percent?
A. The PBM charges the payer AWP minus 14 percent. Okay.
Q. And that would be basically a dollar and seven and a half cents?
A. That's right.

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Q. Now, you agree with me that so long as the manufacturer charges the wholesaler WAC, the payer is not going to be able to get the drug for less than approximately a dollar and seven and a half cents?
MR. SOBOL: Objection. You can answer.
A. I'm sorry, as long as -- say it again.
Q. In other words, the only way the price to the payer is going to go down in my hypothetical is if the manufacturer lowers the price at which it sells the drug to the wholesaler?
(Interruption.)
(Discussion off the record.)
A. The whole -- suppose all of the calculations that you have put forward to date are based on two quantities, an AWP of $1.25 and a WAC of a dollar and the fact that AWP is 25 cents above WAC, 25 percent above WAC. What the allegations in this matter state are that the AWP and WAC at those levels, given

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what the real trans -- there was an expectation of an average sale price or a real value to the manufacturer selling that product into the distribution system reflected by the ASP that had some relationship to AWP being $1.25 and WAC being a dollar, and that ASP may have been 95 cents, whatever it happened to be. That was what the yardsticks are getting at, a relationship of AWP to ASP. And as soon as you have a relationship of AWP to ASP, you have a relationship of WAC to ASP.
What the allegations of the complaints say and what my model, my formulaic methodology -- not mine, what standard formulaic methods, standard microeconomics would state is given those yardsticks, given those expectations, if the ASP were not 95 cents, which is what the implications of the expectations were for the yardstick from an AWP of $1.25, but if the ASP were actually 50 cents and that spread between AWP and ASP

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was 75 cents, that that is the causation and that is the impact and that is the injury and that the AWP should have actually been lower than $1.25 and WAC should have been lower than a dollar, and then every price that you've calculated as a percentage either of WAC or AWP would have been less.
And the reimbursement rate paid by the third-party payer AWP less 16 percent or 14 percent, whatever it was to get to $1.75, if that was off of an AWP of 75 cents or 80 cents related to an ASP of 50 cents, that is what the allegations of this -- of the complaint are, and that is what the formulaic methodologies that I have put forward allow me to estimate the extent of that deviation.
Q. But let's assume that in the but-for world the AWP is 75 cents, 50 cents, whatever you want to make it. The payer, the class member is not going to get that drug for less unless the manufacturer charges the

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wholesaler less than a dollar?
A. Well, he's --
Q. Isn't that true?
A. What's true is if the system works different than it does in reality, it's not the dollar that's important here, the wholesaler had to be paid WAC, and if the AWP is 75 -- is 85 cents -- let's say WAC is -- that's going to be 25 cents above WAC, and WAC will not be a dollar any longer. It's going to be whatever it turns out to be. I can calculate that for you.
Q. What is your basis for assuming that the manufacturer is going to lower the price that it charges the wholesaler in that scenario?
MR. SOBOL: Objection.
A. The allegations in this matter that I've been asked to assume is that defendants entered into an AWP scheme which led to an inflation of AWP relative to the true acquisition cost of the relevant

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pharmaceuticals by the distributors or by the providers or by the intermediaries, whomever, in the system. And so that rather than there being a predictable relationship between AWP and the acquisition cost or ASP, there was a much larger spread that was induced by this scheme.

This fact that they inflated the AWP meant that they inflated WAC because WAC is 20 percent in your example of AWP. So if AWP is too high, WAC is too high. And you're saying that they would have used WAC of a dollar. In the but-for world if the AWP were really at the relationship that it could have been reasonably expected by the class members absent the scheme, AWP would be lower and related by the yardsticks to ASP, and the WAC would be 20 percent below that.

Q. So what you're saying is, based on the way this industry works and the way people understand the relationship between WAC and

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AWP, AWP by definition has to be higher than WAC, correct?

MR. SOBOL: Objection.

A. And any -- look in any of the price compendia and tell me if you find a WAC that's higher than AWP. They're all -- they're -- AWP is always 20 to 25 percent above WAC, and the manufacturer makes it clear what that percentage is.

Q. So in my hypothetical --

MR. SOBOL: Objection.

Q. -- even if the ASP when you take into account all customer classes is 50 cents, so long as the manufacturer is selling the drug to the wholesaler at a dollar, WAC is going to be a dollar and AWP is going to be $1.25, and those are accurate prices?

MR. SOBOL: Objection.

A. I just do not follow that question.

Q. Well --

MR. SOBOL: It's 5:26 now.

MR. EDWARDS: Let me ask one more

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question.

MR. SOBOL: No, you can't. We were going to end at 5:15. I've scheduled some other things.

MR. EDWARDS: Can I just ask one more question, and that's --

MR. SOBOL: No. I gave you one more question six times before lunch, okay? We'll take a break now, and we'll take it up again in the morning.

MR. EDWARDS: Just one more question?

MR. SOBOL: No.

MR. EDWARDS: Please?

MR. SOBOL: No.

MR. EDWARDS: Please? Oh, come on. One more question?

MR. SOBOL: No.

MR. EDWARDS: I would like to get this witness's --

THE WITNESS: Be your best friend.

MR. EDWARDS: -- spontaneous

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answer.

MR. SOBOL: I've been sitting here for the past 10 minutes. I let you have the one more answer, Steve, okay?

MR. EDWARDS: All right. You know the gander rule, Tom.

MR. LYNCH: Just give him one, Tom.

MR. SOBOL: Every once in a while I have to be like not the good guy.

MR. LYNCH: I mean, one more, and then you can break.

MR. SOBOL: All right. One more question. It's one question, Steve.

THE WITNESS: You have to clarify the question.

MR. SOBOL: No, this is a -- go ahead.

BY MR. EDWARDS:

Q. In my hypothetical where the manufacturer is selling the drug to the wholesaler at a dollar --

A. Uh-huh. WAC is a dollar?

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Q. The price is a dollar.
A. That's WAC?
Q. You can call it WAC. You can call it whatever you want.
MR. SOBOL: Stop asking questions. He's got one more question. Let him ask the question, and then you can answer it, Ray.
Q. Do you have any basis for offering an opinion as a professional economist that the manufacturer is going to be willing to sell that drug for less than a dollar if the pricing benchmark for reimbursement changes?
MR. SOBOL: Objection. You may answer if you understand the question.
A. I don't understand the question.
MR. SOBOL: Let's call it a day.
Q. So you have no basis?
MR. SOBOL: Shh.
(Whereupon the deposition was Suspended at 5:29 p.m.)

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The United States District Court
for the District of Massachusetts

I, Jessica L. Williamson, Registered, Merit Reporter, Certified Realtime Reporter and Notary Public in and for the Commonwealth of Massachusetts, do hereby certify that RAYMOND S. HARTMAN, Ph.D., the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am neither related to or employed by any of the parties in or counsel to this action, nor am I financially interested in the outcome of this action.

In witness whereof, I have hereunto set my hand and seal this 7th day of October, 2004.

_____
Jessica L. Williamson, RMR, RPR, CRR
Notary Public, CSR No. 138795
My commission expires: 12/18/2009